Supreme Court, U.S.
FILED

(1)

No. 94 1144 DEC 27 1994

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1994

JOSEPH FOOTE,

Petitioner,

against

WILLIAM HATHAWAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

G. OLIVER KOPPELL
Attorney General of the State of New York
Attorney for Petitioner
The Capitol
Albany, NY 12224
(518) 474-6697

JERRY BOONE
Solicitor General and Counsel of Record
PETER H. SCHIFF
Deputy Solicitor General
MICHAEL S. BUSKUS
Assistant Attorney General

Of Counsel

Dated: December 22, 1994

THE REPORTER CO., INC.- Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264
(4626 – 1994)
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10 pp

Questions Presented

1. Whether an Eighth Amendment damages claim for deliberate indifference to the serious medical needs of a prisoner requires, as an element of a *prima facie* case, expert testimony of a departure from accepted medical standards.

2. Whether the Second Circuit decision, which allows a lower threshold of proof for an Eighth Amendment claim in federal court than that which would be necessary to establish a garden-variety medical malpractice claim in State court, conflicts with the rationale of *Estelle v Gamble*, 429 U.S. 97 (1976).

3. Whether a general practitioner who never denied plaintiff treatment, repeatedly referring him for treatment by qualified orthopedic specialists, lacks the requisite "subjective" indifference to support an Eighth Amendment claim for damages.

Parties

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1. William Hathaway, Plaintiff;

2. Joseph Foote, Defendant;

3. Thomas A Coughlin, Commissioner of the Department of Correctional Services; Everett W. Jones, Superintendent of Great Meadow Correctional Facility; Benjamin Dyette and James Sullivan, Defendants.

The defendants listed in ¶ 3 were dismissed from the lawsuit in the district court; were not involved in the appeal below; and are no longer involved in the case.

Table of Contents

Page

Questions Presented i

Parties ii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Statement of the Case 3

Reasons for Granting the Writ 10

Conclusion 21

Table of Contents to Appendix

Page

APPENDIX A—Judgment and Opinion of the United States Court of Appeals for the Second Circuit Rendered on September 29, 1994 ..... A1

APPENDIX B—Memorandum Opinion and Order of the United States District Court for the Northern District of New York Dated October 27, 1993 ... A23

APPENDIX C—Opinion of the United States Court of Appeals for the Second Circuit Rendered on March 9, 1988 ..... A26

APPENDIX D—Order of the United States District Court for the Northern District of New York Dated July 17, 1986 ..... A35

APPENDIX E—Order of the United States District Court for the Northern District of New York Dated February 18, 1986 and Report and Recommendation of the U.S. Magistrate Judge in Hathaway v. Coughlin A38

TABLE OF AUTHORITIES

Page

CASES:

Bellecourt v United States, 784 F.Supp. 623 (D. Minn. 1992), affd. in part, dismissed in part, 994 F2d 427 (8th Cir. 1993) 14

Benson v Dean, 232 NY 52 (1921) 13

Boring v Kozakiewicz 833 F2d 468 (3d Cir. 1987), *cert. denied*, 485 U.S. 991 (1988)..... 14, 15, 16

Conti v Albany Medical Center Hosp., 159 AD2d 772, 551 NYS2d 994 (3d Dept), lv denied, 76 NY2d 702, 559 NYS2d 239 (1990)..... 18

Estelle v Gamble, 429 U.S. 97 (1976)..... *passim*

Frohmader v Wayne, 958 F2d 1024 (10th Cir. 1992) . 17

Graddy v New York Medical College, 19 AD2d 426, 243 NYS2d 940 (1st Dept 1963), motion to dismiss appeal denied, 13 NY2d 1175, 248 NYS2d 54 (1964)..... 18

Hathaway v Coughlin, 841 F2d 48 (2d Cir. 1988) ("Hathaway I") 3

Page

Hathaway v Coughlin, 37 F3d 63 (2d Cir. 1994) ("Hathaway II")..... *passim*

Howell v Evans, 922 F2d 712 (11th Cir. 1991)..... 17

Markley v Albany Medical Center Hosp., 163 AD2d 639, 558 NYS2d 688 (3d Dept 1990) 18

Sires v Berman, 834 F2d 9 (1st Cir. 1987)..... 17

Warren v State of Missouri, 995 F2d 130 (8th Cir. 1993) 16

Wilson v Seiter, 501 U.S. 294 (1991)..... 18, 19

STATUTES:

42 U.S.C. § 1983 10

OTHER AUTHORITY:

Bard, The New York Law of Medical Malpractice (2d ed. 1989), § 24.02 13

Annot., Necessity of expert evidence to support an action for malpractice against a physician or surgeon, 81 ALR2d 597 (1962)..... 13

Prosser and Keeton on Torts (5th ed. 1984), § 32, p 188 . 13

Stern, Gressman, Shapiro & Geller, Supreme Court Practice (7th ed., 1993), § 41.8, pp. 195-198.... 2, 3

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Opinions Below

The opinion of the Court of Appeals (37 F3d 63 [2d Cir. 1994]) is printed in petitioner's appendix at pages A1-A22.

The opinion of the District Court is printed in petitioner's appendix at pages A23-A25. It is not reported in the Federal Supplement. It is available on WESTLAW at 1993 WL 478141.

A prior opinion of the Court of Appeals is printed in petitioner's appendix at pages A26-A34. It is reported at 841 F2d 48 (2d Cir. 1988).

Jurisdiction

The judgment of the Court of Appeals was filed September 29, 1994.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Although the court below remanded for a new trial, no further action in the trial court will result in this case being more ripe for review at a later juncture. *See,* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed., 1993), § 41.8, pp. 195-198. The court below answered in the negative the questions of whether petitioner was entitled to dismissal of the complaint as a matter of law on the basis of qualified immunity for (a) the absence of any expert testimony showing a departure from accepted medical standards, or (b) the repeated referral by the general practitioner of plaintiff to qualified orthopedic specialists.

Additionally, as amplified in the Reasons for Granting the Writ (*infra,* pp 10-20), the conflict between the decision below and this Court's decision in ***Estelle v Gamble,*** 429 U.S. 97 (1976), warrants review despite the lack of finality.

Treatise writers Stern, Gressman, Shapiro & Geller cite *Estelle* (*Supreme Court Practice*, § 4.18, p 196) as an example of this Court's grant of certiorari to review an important and clear-cut issue of law that is fundamental to the further conduct of the case and which otherwise merits review. While all of the questions presented in this Petition warrant review, questions 1 & 2 are fundamental to further litigation of this, or any other, prisoner claim alleging the deliberate indifference to serious medical needs. Thus, the lack of finality is no bar to granting the petition here.

Statement of the Case

The procedural setting is concisely stated as follows. The claim originated as a *pro se* complaint. It had been dismissed on summary judgment in the District Court (*see*, at pp. A35-A37), but the Court of Appeals reversed and reinstated the complaint. *Hathaway v Coughlin*, 841 F2d 48 (2d Cir 1988) ("*Hathaway I*"); Appendix to Petition for a Writ of Certiorari ("App"), A26-A34. The court stated (841 F2d at 50-51; App, A34):

> Hathaway's affidavit in opposition to [defendants'] motion for summary judgment alleged that a delay of over two years in arranging surgery to correct the broken pins in his hip amounted to deliberate indifference to his serious medical needs. We believe this is a sufficient allegation to survive a motion for summary judgment under *Archer [v Dutcher*, 733 F2d 14 (2d Cir 1984)] because it raises a factual dispute as to whether the appellees showed deliberate indifference to Hathaway's serious medical needs in the period after July 10, 1981. We therefore

disagree with the district court's conclusion that summary judgment was appropriate.

Upon remand, further discovery was conducted and counsel was appointed for plaintiff (Joint Appendix to Second Circuit ["J.App."] 53-61). The case proceeded to trial, at which appellant defended the medical care on the merits and asserted a defense of qualified immunity. After plaintiff rested (J.App. 345), defense counsel moved pursuant to F.R.Civ.P. 50 for judgment as a matter of law in favor of all defendants (J.App. 346). This motion was granted as to all defendants except petitioner (J.App. 346-349).

Defense counsel argued that since plaintiff had failed to offer expert testimony that the medical care and treatment failed to conform to applicable professional standards, *a fortiori,* the proof failed to meet the much higher threshold of deliberate indifference to serious medical needs, which is a prerequisite to liability under the Eighth Amendment (J.App. 349-353, 355-356). The court reserved on the motion to dismiss as to petitioner, but stated that "the court does not find it necessary for the plaintiff to have produced medical experts to establish a deliberate indifference to his serious medical needs" (J.App. 356).

The defense, having elicited relevant testimony on cross-examination, rested without presenting additional proof (J.App. 356). Defense counsel then renewed the motion for dismissal as a matter of law pursuant to F.R.Civ.P. 50 (J.App. 358-359). The court reserved decision (J.App. 360). The jury was deadlocked and the court declared a mistrial (J.App. 461-462).

The district court later denied appellant's F.R.Civ.P. 50(a), (b) motion in a written memorandum decision and order (J.App. 105-107; App, A23-A25). The court reasoned that motions under F.R.Civ.P. 50 should only be granted when there is overwhelming evidence in favor of movant (J.App. 106; App, A24-A25).

The Court of Appeals affirmed by a divided court. *Hathaway v Coughlin,* 37 F3d 63 (2d Cir. 1994); App, A3-A22 ("*Hathaway II*"). The majority, in an opinion by Judge Altimari, after a recitation of the relevant chronology of medical treatment (37 F3d at 64-66; App, A5), identified Dr. Foote's principal arguments as follows:

> Foote contends that the district court should have granted his motions to dismiss because Hathaway (1) did not introduce sufficient evidence of a departure from accepted medical practices and (2) failed to adduce proof of the requisite mental state of culpability associated with deliberate indifference. *Hathaway II*, 37 F3d at 66; App, A8-A9.

With respect to the first question presented in this petition, the Second Circuit framed this issue as follows:

> Foote also contends that the action should have been dismissed because Hathaway did not adduce any expert evidence as to whether Foote's conduct fell below professional norms. Foote argues that by failing to introduce such expert evidence, Hathaway has failed to state a *prima facie* case of medical malpractice. *See Ferretti v Town of Greenburgh,* 595 N.Y.S.2d 494, 497-98 (2d Dept. 1993). Because mere

> medical malpractice does not constitute an Eighth Amendment violation, *see Estelle*, 429 U.S. at 107, Foote claims that Hathaway's failure to establish at least medical malpractice by means of expert proof mandates dismissal of the instant action. *Hathaway II*, 37 F3d at 68; App, A14.

The court answered that question as follows:

> Foote's argument is unpersuasive. *We have never required plaintiffs alleging a denial of adequate medical care in a Section 1983 action to produce expert medical testimony.* The inquiry remains whether the treating physician or other prison official was deliberately indifferent to a prisoner's serious medical needs, not whether the doctor's conduct is actionable under state malpractice law. Expert testimony certainly could have bolstered Hathaway's case at trial, but the absence of such expert proof does not mandate dismissal of his action where the facts support a finding of deliberate indifference. *Hathaway II*, 37 F3d at 68; App, A14 (emphasis added).

With respect to the third question presented in the petition, the court framed Dr. Foote's argument as follows:

> Foote claims that his conduct could not amount to deliberate indifference because he, a general practitioner, merely referred Hathaway to a specialist. Foote cites New York malpractice law, which holds a general practitioner to a more deferential standard when he has referred a patient to a competent spe-

> cialist. *See Markley v. Albany Medical Center Hospital,* 558 N.Y.S.2d 688, 689-90 (App. Div. 1990). Foote claims that he reasonably relied on Quellman and Schlesinger to render any necessary care to Hathaway. *Hathaway II,* 37 F3d at 68; App, A12-A13.

The majority reasoned that Dr. Foote could not rely on referring the patient to a specialist because Dr. Foote continued to treat the patient for complaints of pain. *Hathaway II,* 37 F3d at 68; App, A13. The court added:

> *** Foote was the official most familiar with Hathaway's condition, even as a general practitioner. We decline to adopt a rule that in effect would exempt general practitioners from being found deliberately indifferent to a patient's serious medical needs as long as that general practitioner at some point refers the patient to a specialist, regardless of the extent of contact that general practitioner has with the patient. *Hathaway II,* 37 F3d at 68; App, A13.

In concluding that plaintiff had adduced enough evidence to warrant another jury trial, despite (a) the absence of expert medical testimony of any departures from professional medical standards, and (b) Dr. Foote's repeated referrals of plaintiff to a specialist, the majority reasoned as follows:

> A jury could infer deliberate indifference to Hathaway's serious medical needs from Foote's failure (1) to disclose the broken pins and to discuss the option of surgery with Hathaway despite his sudden re-

> surgence of hip pain and (2) to refer Hathaway for reevaluation for surgery until late 1982 despite requests for further treatment from Hathaway and student attorneys acting on his behalf. *Hathaway II*, 37 F3d at 68-69; App, A13-A14.

In his dissenting opinion, Judge Jacobs stated that this case should have been brought as a state court action for medical malpractice. *Hathaway II*, 37 F3d at 69; App, A16. He noted that this surgery was elective, with the need for it gauged by the degree of pain plaintiff was experiencing. *Hathaway II*, 37 F3d at 69; App, A16.

> It is also undisputed that the surgery was offered on December 2, 1977. Hathaway, who best knew the level of his discomfort and his ability to contend with it, declined that option on February 3, 1978. When he asked Dr. Foote for surgery in 1981, Dr. Foote promptly referred Hathaway to a specialist. Hathaway asked for hip surgery again on August 5, 1983, but he recanted a few hours later and demanded a second opinion. These events refute altogether the idea that Hathaway was begging an indifferent and calloused doctor for a surgical procedure required to alleviate his agony. Pain is subjective. Given the level of pain that the patient is suffering, the patient's own pain threshold, the risks and possible benefits of an operation, and the pain of surgery, there is nothing odd about someone waiting years before undergoing elective orthopedic surgery. *Hathaway II*, 37 F3d at 69; App, A16-A17.

Judge Jacobs acknowledged that there had been a one year delay in informing plaintiff that x-rays had revealed that

prosthetic pins had broken. *Hathaway II*, 37 F3d at 70; App, A18. However, the only medical testimony in the case—from the orthopedic surgeon who ultimately performed the surgery (but who never rendered any expert opinion about petitioner's medical care)—was to the effect that the breaking of the pins was a marginal consideration. *Hathaway II*, 37 F3d at 70; App, A18. The only medical testimony in the case was to the effect that plaintiff's subjective complaints of pain would be the determining factor in whether or not surgery would be desirable or would occur. *Hathaway II*, 37 F3d at 70; App, A18.

Judge Jacobs pointed out the unfairness of holding a general practitioner liable for failing to offer plaintiff surgical options which would or could have been offered by a qualified specialist to whom petitioner promptly and repeatedly referred plaintiff. *Hathaway II*, 37 F3d at 71; App, A19-A20. The dissenter also stated that the facts here simply did not fit the profile of deliberate indifference contemplated in *Estelle v Gamble*, 429 U.S. 97 (1976). Judge Jacobs explained:

> What did Dr. Foote do? He arranged consultations with a medical specialist who offered surgery to correct the condition; when the patient declined surgery, Dr. Foote issued pain-killers, prescribed and arranged the replacement of corrective footwear, arranged housing on the first floor of the prison to reduce stair-climbing, and excused the prisoner from work detail. Altogether, Dr. Foote saw his patient dozens of times. *Hathaway II*, 37 F3d at 71; App, A20.

REASONS FOR GRANTING THE WRIT

I.

This Court should grant the writ to resolve an important question left open in *Estelle v Gamble*, 429 U.S. 97 (1976), namely, whether expert testimony is a necessary element of a *prima facie* case of deliberate indifference to serious medical needs in an Eighth Amendment claim for money damages brought under 42 U.S.C. § 1983. In answering that question in the negative, the Second Circuit decision is at odds with the rationale, as well as the holding, of *Estelle*.

Estelle held that a prisoner's *pro se* complaint, alleging the refusal by prison guards to take the prisoner to see a doctor, stated a claim under 42 U.S.C. § 1983 for damages under the Eighth Amendment. *Estelle*, 429 U.S. at 99, 105-106. The District Court had dismissed the complaint for failure to state a claim upon which relief could be granted. 429 U.S. at 98. The Court of Appeals reversed and remanded with instructions to reinstate the complaint. 429 U.S. at 98. This Court reversed in part. *Estelle*, 429 U.S. at 106-108. This Court held that, insofar as the complaint alleged errors or omissions by the physician who had previously treated plaintiff at the prison, it failed to state a cause of action because the errors or omissions—even viewed in the light most favorable to plaintiff—amounted to no more than a claim of malpractice possibly actionable under State tort law. *Estelle*, 429 U.S. at 107 ("A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act."). Thus, with respect to the doctor who failed properly to diagnose and treat plaintiff's back

problems, this Court ordered reversal and dismissal of the complaint. 429 U.S. at 107-108.

As to the Director of the Department of Corrections and the prison warden, this Court held that the complaint sufficiently stated a cause of action. *Estelle,* 429 U.S. at 108. As to those defendants, this Court sustained the cause of action on the pleadings on the basis that there were colorable allegations that a prison disciplinary committee, without further medical examination or testimony, placed the prisoner in solitary confinement for "refusal to work", despite the prisoner's complaint of severe back pain and high blood pressure. 429 U.S. at 101. Additionally, when the prisoner's condition deteriorated to the extent that he asked to see a physician for chest pains and "blank outs", it was another 11 1/2 hours before plaintiff was examined by a medical assistant. 429 U.S. at 101. A few days later, despite complaints of chest, arm and back pains, guards refused plaintiff's requests to be seen by a physician. 429 U.S. at 101. As to the Director of Corrections and the jail warden, this Court held that the complaint stated a cause of action because it made colorable allegations of intentionally denying or delaying access to medical care. 429 U.S. at 104-105, 108.

In dismissing the complaint as against the treating physician and medical director, this Court plainly contemplated that considerably more than a garden-variety claim for medical malpractice was needed to allege, *much less to prove,* a violation of the Eighth Amendment. Thus, even though a portion of the complaint survived the motion to dismiss, this Court cautioned the lower courts not to blur the distinction between the Eighth Amendment and State tort law:

> This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. 429 U.S. at 105.
>
> Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." *Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.* 429 U.S. at 105-106 (emphasis added).

Here, absent expert testimony, not even medical malpractice could have been shown.

II.

The Second Circuit has disregarded those cautionary guidelines in *Estelle*, thereby eroding the wall separating garden-variety State-law claims of medical malpractice (which belong in State court) and true Eighth Amendment claims of deliberate indifference to serious medical needs (which qualify as Federal claims). In bluntly confessing that "[w]e have *never* required plaintiffs alleging a denial of adequate medical care in a Section 1983 action to produce expert medical testimony," *Hathaway II*, 37 F3d at 68; App, A14 (emphasis added), the Court of Appeals virtually invited run-of-the-mill medical malpractice claims to be filed

in Federal court under the guise of Eighth Amendment claims. Moreover, because apart from the exceptional case, expert medical opinion is a necessary element of a prima facie case of a malpractice case, the decision of the Second Circuit *lowered* the threshold of proof to avoid a motion to dismiss predicated upon qualified immunity, and hence to raise a "jury question". This Court never remotely contemplated that the Courts of Appeals would construe *Estelle* in such a manner.

Expert testimony should be considered as a mandatory element of a *prima facie* case of an Eighth Amendment claim alleging deliberate indifference to a prisoner's serious medical needs for two reasons: *first*, the common law requires expert testimony to prove most medical malpractice cases; and, *second*, this Court in *Estelle v Gamble*, 429 U.S. 97 (1976), held that much *more* than ordinary malpractice was necessary to establish a constitutional claim under the Eighth Amendment.

Absent a highly unusual case such as a foreign object unintentionally left in a patient during surgery (*see, e.g., Benson v Dean*, 232 NY 52, 55-56 [1921] [broken needle left in rectum after hemorrhoidectomy]), expert testimony has always been required for garden-variety medical malpractice cases. *See, e.g., Prosser and Keeton on Torts* (5th ed. 1984), § 32, p 188 ("Since juries composed of laymen are normally incompetent to pass judgment on questions of medical science or technique, it has been held in the great majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it"); *Accord*, Bard, *The New York Law of Medical Malpractice* (2d ed. 1989), § 24.02; Annot., *Necessity of expert evidence to support an action for malpractice against a*

physician or surgeon, 81 ALR2d 597 (1962); *Bellecourt v United States,* 784 F.Supp. 623, 637-638 (D. Minn. 1992), *affd. in part, dismissed in part,* 994 F2d 427 (8th Cir. 1993) (in a combined action by prisoner under the Federal Tort Claims Act and Eighth Amendment, the failure of physicians timely to diagnose or treat a heart attack was not actionable absent timely submission by plaintiff of expert testimony).

This Court never contemplated in *Estelle v Gamble,* 429 U.S. 97 (1976), that proof, after a full trial, which was qualitatively insufficient to demonstrate a *prima facie* case of medical malpractice under State tort law would, nonetheless, still suffice to establish a constitutional claim for deliberate indifference. Yet, that is exactly what happened in the case at bar.

There is simply no reason for this Court to encourage prisoners to bring medical malpractice claims in federal court by offering them a *lower* threshold of proof than would apply in a garden variety medical malpractice claim in State court. Yet, that is precisely the effect of the Second Circuit's decision.

III.

In addition, there is some tension, if not an actual conflict, in decisions among the Circuits on the necessity of expert opinion as an element of a *prima facie* case of deliberate indifference to the serious medical needs of prisoners. In *Boring v Kozakiewicz,* 833 F2d 468 (3d Cir. 1987), *cert. denied,* 485 U.S. 991 (1988), the court held that an Eighth Amendment claim would fail at the outset if it was not

supported by expert medical testimony that the condition for which treatment was sought was a serious medical need. *Boring*, 833 F2d at 473.

Although *Boring* involved multiple plaintiffs (all of whom were former pretrial detainees at the same jail), the named plaintiff had an injury similar to that of respondent here. Mr. Boring had a pre-existing injury to his arm, caused by ulnar nerve neuropathy. 833 F2d at 469. This condition resulted in numbness and spasm of several fingers and throbbing pain in the wrist. 833 F2d at 469. Three or four days after his incarceration, Mr. Boring was seen by Dr. Johnson, the jail physician, who recommended a consultation with a specialist. 833 F2d at 469. The visit to a specialist ultimately took place five months later. 833 F2d at 469. After receiving the report of the consultant, the jail physician advised Mr. Boring that corrective surgery was elective and could wait until the prisoner was released or sent to another institution. 833 F2d at 469. Plaintiff also raised other medical complaints, with respect to dental treatment and scalp treatment. 833 F2d at 469-470.

The trial court in *Boring* dismissed plaintiff's complaint at the close of plaintiff's case, in response to defendant's motion for a directed verdict. 833 F2d at 470. The court reasoned that because there was no expert testimony that the medical conditions were serious or that the care and treatment fell below accepted medical standards, plaintiff failed to meet his burden of proof. 833 F2d at 470. The Court of Appeals for the Third Circuit affirmed, holding that a finder of fact could not determine that Mr. Boring's condition was urgent or acute in the absence of qualified expert medical testimony. 833 F2d at 473. Although the Third Circuit never got to the question of whether expert testimony was also

necessary to establish, in tort parlance, the "departure" from accepted professional medical standards, the court logically could not have meant to require a plaintiff to present expert medical proof on the threshold question of "seriousness" or "acuteness" of the medical need, only to be spared a similar evidentiary burden on the central question of the departure from accepted medical standards in the care and treatment rendered to the prisoner. *See, Boring,* 833 F2d at 473.

It is also instructive that one of several inmate plaintiffs who litigated their claims in tandem with Mr. Boring's claim involved *elective orthopedic surgery!* Inmate Geidel, who had a pre-existing knee injury, alleged that he had previously planned surgery shortly before his confinement. *Boring,* 833 F2d at 473. The Third Circuit said that the delay of elective surgery "for the presumably brief detention period preceding trial" did not establish an "acute" medical need as to which the Eighth Amendment applied. *Boring,* 833 F2d at 473. The court reached the same conclusion as to the delay in providing inmate Boring with temporary dental fillings. *Boring,* 833 F2d at 468.

The approach of the Third Circuit in *Boring* is at least arguably in conflict with the approach of the Second Circuit in the case at bar.

Other courts, similarly, have suggested that expert medical testimony is necessary, both to establish the threshold of a "serious medical condition" and to meet the burden of proof on the questions of "departures" from professional standards and as to "proximate cause". *See, e.g., Warren v State of Missouri,* 995 F2d 130, 131 (8th Cir. 1993) (failure to provide physical therapy after treatment for a broken

wrist; affirming summary judgment in favor of defendant because of plaintiff's failure to tender an affidavit from an expert); *Frohmader v Wayne*, 958 F2d 1024, 1028-29 (10th Cir. 1992) (prisoner's alleged condition of claustrophobia and agoraphobia was not shown by expert opinion to be acute or urgent; affirming summary judgment in favor of defendants); *Howell v Evans*, 922 F2d 712, 719-20 (11th Cir. 1991) (inmate who died from a severe asthma attack could not establish a cause of action absent expert testimony that the health care providers departed from accepted medical standards; summary judgment for defendant affirmed); *Sires v Berman*, 834 F2d 9, 12-13 (1st Cir. 1987) (failure to assist post-cardiac-surgery prisoner in applying nitroglycerin paste was not shown to have resulted in a serious medical deprivation; affirming summary judgment in favor of defendant).

IV.

In addition to the basic definitional question of whether expert testimony is a necessary element of a *prima facie* case of an Eighth Amendment claim alleging deliberate indifference, the decision below warrants review for the further reason that it improperly imposed upon general practitioners the higher professional standards applicable to medical specialists. Dr. Foote is a general practitioner. However, despite his repeated referrals of respondent to orthopedic specialists, the Second Circuit majority held that petitioner should have offered respondent surgical options. This is unfair. The "deliberate indifference" standard of liability for an Eighth Amendment violation contemplates that even if a plaintiff establishes the "objective" component of liability, the claim would still fail if the defendant's state of

mind did not display the requisite "subjective" aspect of cruel or wanton misconduct.

In *Wilson v Seiter,* 501 U.S. 294 (1991), this Court held that the *Estelle v Gamble* test of "deliberate indifference" would be governed by a two-part test, part objective and part subjective. *Wilson,* 501 U.S. at 296-302. Borrowing from the "excess force" cases, the Court explained that "[t]hese cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment". *Wilson,* 501 U.S. at 299.

Petitioner maintains that, consistent with the reasonable expectations of general practitioners who refer patients to specialists, his errors or omissions (if any) could not possibly rise to the culpable mental state of cruel or wanton misconduct as required in *Wilson.*

Petitioner's referral of a patient with orthopedic problems to an orthopedic surgeon must be viewed against the backdrop of New York medical malpractice law. It is firmly established that a general practitioner is judged in malpractice cases by a very deferential and lenient standard when the general practice physician has referred the patient to a competent specialist. *Markley v Albany Medical Center Hosp.,* 163 AD2d 639, 640, 558 NYS2d 688, 689-690 (3d Dept 1990) (pediatrician who referred an infant to an oncology team for cancer treatment could not be held liable for errors or omissions of oncologists); *Conti v Albany Medical Center Hosp.,* 159 AD2d 772, 773-775, 551 NYS2d 994, 996-997 (3d Dept), *lv denied,* 76 NY2d 702, 559 NYS2d 239 (1990) (neither the hospital, nor the pathologists, nor the radiation oncologist could be liable for errors of the surgeon); *see also, Graddy v New York Medical College,* 19

AD2d 426, 429-430, 243 NYS2d 940, 943-944 (1st Dept 1963), *motion to dismiss appeal denied*, 13 NY2d 1175, 248 NYS2d 54 (1964) (surveying cases which recognize the responsibility of the specialist to whom the referring physician sent the patient and which exonerate the referring physician when the specialist assumes the care and treatment).

Although petitioner continued to treat respondent for complaints of pain and ordered replacement footwear for respondent in response to his requests (*Hathaway II*, 37 F3d at 68-69; App, A13-A15), petitioner was entitled to rely on orthopedic surgeons to offer and evaluate invasive surgical procedures.

Just as it is appropriate in a qualified immunity case involving a police officer to explore the state of the applicable law as reflecting on what the officer should be presumed to know, it is relevant here that a general practitioner like Dr. Foote reasonably could assume that orthopedic specialists like Drs. Schlesinger and Quellman would render any specialized care and treatment to respondent. Those orthopedic specialists had the necessary training and experience with which to care for any of respondent's needs. Having made appropriate referrals to those orthopedists, Dr. Foote is not responsible for any errors or omissions they might commit. More significantly, the repeated referrals of respondent by Dr. Foote to orthopedic specialists simply is not consistent with the mentally culpable state of cruel and wanton misconduct as required under *Wilson*.

The most that could possibly be said against Dr. Foote is that he, as a general practice physician referring a patient to orthopedic specialists, did not directly tell the patient all of

the options for health care which were within the bailiwick of the orthopedic specialists to prescribe or evaluate. At no time did petitioner refuse the prisoner's requests to be seen by specialists (Drs. Quellman or Schlesinger). Moreover, when plaintiff finally made a request for *elective surgery,* it was scheduled within short order. That level of subjective culpability, *if it is actionable at all under State law,* does not rise to the level of deliberate indifference in the mind of petitioner so as to subject him to liability under the Eighth Amendment.

Under all the circumstances of this case, an Eighth Amendment violation was never established. The courts below should have dismissed the complaint on the basis of qualified immunity.

This Court should grant the writ.

CONCLUSION

This Court should grant the Writ of Certiorari.

Dated: Albany, New York
December 22, 1994

Respectfully submitted,

G. OLIVER KOPPELL
Attorney General of the
State of New York
Attorney for Petitioner

JERRY BOONE
Solicitor General and Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General

Of Counsel

APPENDIX A—Judgment and Opinion of the United States Court of Appeals for the Second Circuit Rendered on September 29, 1994

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of September, one thousand nine hundred and ninety-four.

Present: Hon. Frank X. Altimari
Hon. Joseph M. McLaughlin
Hon. Dennis G. Jacobs

Circuit Judges.

WILLIAM HATHAWAY,

Plaintiff-Appellee,

v.

THOMAS A. COUGHLIN, Commissioner of the Department of Correctional Services, EVERETT W. JONES, Superintendent of Great Meadow Correctional Facility; BENJAMIN DYETTE and JAMES SULLIVAN,

Defendants,

JOSEPH FOOTE,

Defendant-Appellant.

93-2732

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court.

GEORGE LANGE III, Clerk
By: Edward J. Guardaro
Staff Attorney

Filed Sep 29, 1994
United States Court of Appeals
Second Circuit
George Lange III, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1530—August Term 1993

(Argued: April 18, 1994 Decided: September 29, 1994)

Docket No. 93-2732

WILLIAM HATHAWAY,

Plaintiff-Appellee,

—v.—

THOMAS A. COUGHLIN, Commissioner of the Department of Correctional Services, EVERETT W. JONES, Superintendent of Great Meadow Correctional Facility; BENJAMIN DYETTE and JAMES SULLIVAN,

Defendants,

JOSEPH FOOTE,

Defendant-Appellant.

Before:

ALTIMARI, MCLAUGHLIN, and JACOBS,
Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York (Scullin, *J.*), denying defendant-appellant's motions for a directed verdict in action by prison inmate under 42 U.S.C. § 1983 alleging deliberate indifference to his medical needs in violation of the Eighth Amendment.

Affirmed.

Judge Jacobs dissents in a separate opinion.

MICHAEL S. BUSKUS, Assistant Attorney General for the State of New York, Albany, N.Y. (G. Oliver Koppell, Attorney General, Peter H. Schiff, Deputy Solicitor General, Peter G. Crary, Assistant Attorney General, Albany, N.Y., of counsel), *for Defendant-Appellant.*

EDWARD Z. MENKIN, Syracuse, N.Y., *for Plaintiff-Appellee.*

ALTIMARI, *Circuit Judge*:

Defendant-appellant Joseph Foote ("Foote") appeals from an order of the United States District Court for the Northern District of New York (Scullin, *J.*), denying his motions for a directed verdict. Plaintiff-appellee William Hathaway ("Hathaway"), an inmate at a New York State correctional facility, instituted this action under 42 U.S.C. § 1983, alleging that Foote, who was a prison doctor, and other defendants exhibited deliberate indifference to his

serious medical needs in violation of the Eighth Amendment. After the jury could not reach a verdict, the district court declared a mistrial and denied Foote's motions to dismiss. Because we conclude that a rational jury could find that Foote was deliberately indifferent to Hathaway's serious medical needs, we affirm the order of the district court.

BACKGROUND

Hathaway was an inmate at the Great Meadow Correctional Facility ("Great Meadow") operated by New York State. In 1973, prior to his incarceration, Hathaway underwent hip fusion surgery for his arthritic left hip. During the surgery, three metal pins were inserted to stabilize his left hip joint. Hathaway continued to experience pain after this surgery and first sought medical attention at Great Meadow on June 17, 1977, when he was evaluated by Dr. Schlesinger ("Schlesinger"). Schlesinger found that Hathaway's left leg was shorter than his right, and prescribed orthopedic shoes to effect a height equalization. Shortly thereafter, Foote, a general practitioner, consulted with Schlesinger regarding Hathaway's condition.

On November 22, 1977, Hathaway was referred to Dr. Quellman ("Quellman"), an orthopedic specialist, based on a radiology report revealing that Hathaway suffered from a degenerative disease in the left hip joint. Quellman confirmed that Hathaway's hip had not fused properly and noted in his report that three metal pins crossed the hip joint. Quellman also noted that he offered Hathaway the option of surgery to refuse the hip, which Hathaway declined on February 3, 1978. Although he declined surgery at that time, Hathaway continued to seek medical attention for recurrent pain in his hip six times

over the next several months. In response to Hathaway's complaints, Foote prescribed new orthopedic shoes and recommended that Hathaway be housed on a first-floor cell and exempted from heavy lifting.

Hathaway's medical record does not reveal any complaints of pain in 1979. Beginning in May 1980, however, Hathaway complained about his hip pain to Foote with increasing regularity. Shortly after he began to suffer hip pain, x-rays taken on July 10, 1980 revealed that two of the three pins in Hathaway's hip had broken. Based on this x-ray, Foote authorized a consultation with Quellman on September 12, 1980. Quellman determined that although the pins had broken, the condition of the hip and the arthritis had not changed otherwise.

Neither Foote nor Quellman informed Hathaway of the broken pins or discussed the option of surgery with him. Hathaway's pain persisted; he complained about his hip pain on ten occasions in 1980 and on twenty-three occasions in 1981, and once was kept for two nights in the prison infirmary because of hip pain. Foote, who saw Hathaway on most of these occasions, typically gave him pain killers.

Hathaway ultimately learned of the broken pins in his hip in July 1981 from a nurse at Great Meadow, one year after Foote and Quellman initially discovered the broken pins. Hathaway testified at trial that within one to two weeks after learning of his condition, he told Foote that he would consent to surgery. Foote referred him to Quellman and did not discuss the option of surgery with him at that time or subsequently. Hathaway claimed that he did not previously request surgery because he was not aware of his condition.

Hathaway's hip pain persisted and he continued to complain to Foote and others. In fact, on January 21, 1982, a Prisoners' Legal Services student attorney wrote to Everett Jones ("Jones"), the superintendent of Great Meadow, on behalf of Hathaway. The letter stated that two independent physicians determined that the treatment Hathaway was receiving—anti-inflammatory medicine and orthopedic shoes—was inadequate given his frequent complaints of pain. The student attorney requested that Hathaway be evaluated and given more extensive treatment. A second student attorney wrote on Hathaway's behalf on October 12, 1982, informing Jones that Hathaway would consent to hip surgery and requesting a new evaluation and treatment plan. Foote responded to Jones by memorandum with respect to both letters. By this time, Hathaway had complained about his pain sixteen times in 1982.

Two weeks later, Hathaway filed an action *pro se* pursuant to 42 U.S.C. § 1983 against several defendants, including Jones and Foote, alleging a denial of medical care. Shortly thereafter, Foote informed Jones that although Hathaway had declined a previous offer of surgery, Foote would refer Hathaway to Quellman for a re-evaluation for surgery. Hathaway met with Quellman on February 4, 1983, and as a result, more sophisticated tests were performed. Quellman testified at trial that as a result of these tests, he concluded that surgery to remove the pins was not medically necessary, but that surgery might reduce Hathaway's pain. Hathaway was then given the option of surgery. He received a second opinion from Schlesinger, who advised that surgery would be appropriate to remove the pins and to perform a bone graft to correct certain deformities. On October 13, 1983, Quellman performed the surgery, during which he removed the

accessible portions of the broken pins and repaired portions of the hip by bone graft.

Initially, the district court granted defendants' motion for summary judgment and dismissed Hathaway's complaint on the grounds that he failed to state a claim of deliberate indifference to his serious medical needs as required by *Estelle v. Gamble*, 429 U.S. 97 (1976). We reversed the district court's grant of summary judgment because Hathaway's allegation of a two-year delay in arranging hip surgery could constitute the required deliberate indifference. *See Hathaway v. Coughlin*, 841 F.2d 48 (2d Cir. 1988).

Upon remand, counsel was appointed for Hathaway and the case proceeded to trial. At the close of evidence, the district court dismissed the complaint against the defendants other than Foote pursuant to Fed. R. Civ. P. 50(a) because of their lack of personal involvement in his care and reserved decision with respect to Foote's motion to dismiss. After the jury ultimately deadlocked, the district court declared a mistrial, at which point Foote moved for dismissal under Fed. R. Civ. P. 50(b). The district court denied Foote's motions, stating that it could not "find that the evidence presented at trial was so overwhelming in favor of [Foote] that reasonable and fair-minded individuals could not arrive at a verdict against [him]." Foote now appeals.

DISCUSSION

On appeal, Foote contends that the district court should have granted his motions to dismiss because Hathaway (1) did not introduce sufficient evidence of a departure from accepted medical practices and (2) failed to adduce

proof of the requisite mental state of culpability associated with deliberate indifference. In reviewing the denial of Foote's motion to dismiss, we apply the same standard as did the district court. *See Sarus v. Rotundo*, 831 F.2d 397, 400 (2d Cir. 1987). A directed verdict is proper only when, viewing the evidence in a light most favorable to the non-moving party and resolving all reasonable inferences in that party's favor, "there is such overwhelming evidence to support the moving party's position that fair and reasonable people could not arrive at a verdict against him." *Hendricks v. Coughlin*, 942 F.2d 109, 112 (2d Cir. 1991) (citations omitted).

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments" on those convicted of crimes, which includes punishments that "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citations omitted). The Eighth Amendment also applies to prison officials when they provide medical care to inmates. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To establish an unconstitutional denial of medical care, a prisoner must prove "deliberate indifference to [his] serious medical needs." *Id.* at 104.

The deliberate indifference standard embodies both an objective and a subjective prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious." *Wilson v Seiter*, 501 U.S. 294, 298 (1991). *See Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, *J.*, dissenting) (standard contemplates "a condition of urgency, one that may produce death, degeneration, or extreme pain") (citations omitted). Second, the charged official must act with a sufficiently culpable state of mind. *See Wilson*, 501 U.S. at 298. Deliberate indifference requires more than negligence, but less than conduct undertaken

for the very purpose of causing harm. *See Farmer v. Brennan*, 114 S.Ct. 1970, 1978 (1994). More specifically, a prison official does not act in a deliberately indifferent manner unless that official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 1979.

A prison official, however, may claim qualified immunity from suit in certain circumstances. This affirmative defense shields public officials from liability for their discretionary acts that do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Even where, as here, a plaintiff's federal rights are well-established, qualified immunity is still available to an official if it was "objectively reasonable for the public official to believe that his acts did not violate those rights." *Kaminsky v. Rosenblum*, 929 F.2d 922, 925 (2d Cir. 1991) (citations omitted).

As a threshold matter, we must consider Hathaway's contention that we lack appellate jurisdiction because of the interlocutory nature of the order denying Foote's motions to dismiss. Although the order is interlocutory, a denial of a claim of qualified immunity is immediately appealable where it turns on an issue of law. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Where issues of fact remain with respect to the resolution of a qualified immunity claim, however, an order is not a "final decision" subject to immediate review. *See Moffitt v. Town of Brookfield*, 950 F.2d 880, 884 (2d Cir. 1991) (citations omitted). Although the parties disagree on the legal significance of the facts adduced at trial, no genuine factual disputes remain that would warrant dismissal for lack of appellate

jurisdiction. Therefore, the central issue is whether a reasonable jury could conclude that Foote exhibited deliberate indifference to Hathaway's serious medical needs.

(a) *Serious Medical Needs*

The record clearly supports a finding that Hathaway had serious medical needs. His degenerative hip condition required corrective surgery prior to his incarceration. After the initial surgery, Hathaway continued to experience great pain over an extended period of time and had difficulty walking. Between May 1980 and his surgery in October 1983, Hathaway registered complaints of hip pain on almost seventy occasions.

Foote claims that Hathaway failed to contradict Quellman's testimony that the pain was not caused by the broken pins, but rather was caused by movement within the hip. Quellman admitted, however, that the broken pins "might have been part of his pain" and that he was not asserting that "there was no element . . . of pain derived from the pins." Moreover, Foote himself testified that part of the reason he requested approval for surgery was to remove the pins because "some orthopedic people feel that if you get the hardware out, [the hip] will heal a little better." Based on this testimony and the fact that shortly before the broken pins were discovered, Hathaway began to complain with great frequency about pain, even though he had not previously complained for over a year and a half when the pins were presumably intact, a rational jury could find that the broken pins contributed to Hathaway's pain. Because we find that Hathaway had serious medical needs, we next consider whether Foote was deliberately indifferent to those needs.

(b) *Deliberate Indifference*

We believe that a rational jury could find that Foote was deliberately indifferent to Hathaway's serious medical needs in that he knew of and disregarded an excessive risk to Hathaway's health. *See Farmer*, 114 S.Ct. at 1979. Most telling is the fact that Foote never informed Hathaway that he had two broken pins in his hip. Hathaway did not learn of his condition for one year after the July 1980 x-ray. The presence of broken pins in a hip is information that would give most people pause to consider surgery. Nonetheless, Foote never shared this information with Hathaway or raised the possibility of surgery with him following the discovery of the broken pins.

A jury could also infer deliberate indifference from the delay of over two years between the discovery of the broken pins and the time Foote asked that Hathaway be re-evaluated for surgery in November 1982. Hathaway testified that shortly after learning of the broken pins, he told Foote that he would consent to hip surgery. Moreover, two student attorneys wrote on behalf of Hathaway requesting further evaluation and additional treatment. A jury could conclude that despite these requests and Hathaway's constant complaints, Foote did not take Hathaway's condition seriously because he did not refer Hathaway to Quellman for a re-evaluation until after Hathaway filed his lawsuit on October 25, 1982.

Foote claims that his conduct could not amount to deliberate indifference because he, a general practitioner, merely referred Hathaway to a specialist. Foote cites New York malpractice law, which holds a general practitioner to a more deferential standard when he has referred a patient to a competent specialist. *See Markley v. Albany Medical Center Hospital*, 558 N.Y.S.2d 688, 689-90 (App.

Div. 1990). Foote claims that he reasonably relied on Quellman and Schlesinger to render any necessary care to Hathaway.

We disagree. This is not a case where a general practitioner merely referred a patient to a specialist and had limited subsequent contact with that patient. To the contrary, Foote personally saw and treated Hathaway on the majority of the numerous occasions on which Hathaway complained about pain. As such, Foote was the official most familiar with Hathaway's condition, even as a general practitioner. We decline to adopt a rule that in effect would exempt general practitioners from being found deliberately indifferent to a patient's serious medical needs as long as that general practitioner at some point refers the patient to a specialist, regardless of the extent of contact that general practitioner has with the patient.

Foote also makes much of the fact that Hathaway declined an offer of surgery in 1978 and did not request surgery for some time after that. Hathaway declined this surgery, however, more than two years before the broken pins were discovered in his hip and more than three years before he was informed of his condition. The fact that he did not request surgery is thus understandable given that crucial information bearing on his condition was never disclosed to him.

Nor does the fact that Foote frequently examined Hathaway necessarily vindicate Foote. The course of treatment Hathaway received clearly did not alleviate his suffering—between May 1980 and October 25, 1982, he complained of hip pain on nearly fifty occasions. Twenty of these complaints were made in the period after the broken pins were discovered but before Hathaway was so informed. A jury could infer deliberate indifference from

the fact that Foote knew the extent of Hathaway's pain, knew that the course of treatment was largely ineffective, and declined to do anything more to attempt to improve Hathaway's situation.

Foote also contends that the action should have been dismissed because Hathaway did not adduce any expert evidence as to whether Foote's conduct fell below professional norms. Foote argues that by failing to introduce such expert evidence, Hathaway has failed to state a *prima facie* case of medical malpractice. *See Ferretti v. Town of Greenburgh*, 595 N.Y.S.2d 494, 497-98 (2d Dept. 1993). Because mere medical malpractice does not constitute an Eighth Amendment violation, *see Estelle*, 429 U.S. at 107, Foote claims that Hathaway's failure to establish at least medical malpractice by means of expert proof mandates dismissal of the instant action.

Foote's argument is unpersuasive. We have never required plaintiffs alleging a denial of adequate medical care in a Section 1983 action to produce expert medical testimony. The inquiry remains whether the treating physician or other prison official was deliberately indifferent to a prisoner's serious medical needs, not whether the doctor's conduct is actionable under state malpractice law. Expert testimony certainly could have bolstered Hathaway's case at trial, but the absence of such expert proof does not mandate dismissal of his action where the facts support a finding of deliberate indifference.

In summary, we do not believe that the evidence produced at the first trial was so overwhelming in favor of Foote that a rational jury could not conclude that he was deliberately indifferent to Hathaway's serious medical needs. A jury could infer deliberate indifference to Hathaway's serious medical needs from Foote's failure (1) to

disclose the broken pins and to discuss the option of surgery with Hathaway despite his sudden resurgence of hip pain and (2) to refer Hathaway for re-evaluation for surgery until late 1982 despite requests for further treatment from Hathaway and student attorneys acting on his behalf. Assuming that Foote was deliberately indifferent to Hathaway's serious medical needs, he is not entitled to qualified immunity because it would not be objectively reasonable for him to believe his conduct did not violate Hathaway's rights. Foote's arguments regarding his status as a general practitioner, the cause of Hathaway's pain, and the absence of expert proof may in fact persuade a second jury that he did not violate Hathaway's Eighth Amendment rights. We believe, however, that this is properly a case for a jury to resolve. Accordingly, the district court correctly denied Foote's motions to dismiss.

CONCLUSION

Based on the foregoing, we affirm the order of the district court.

JACOBS, *Circuit Judge*, dissenting:

I respectfully dissent, because in my view Dr. Foote's qualified immunity is amply shown on the fullest possible record—the transcript of a full trial on the merits.

I

In evaluating Dr. Foote's claim of qualified immunity, the majority frames the critical question as "whether a reasonable jury could conclude that [Dr.] Foote exhibited

deliberate indifference to Hathaway's serious medical needs." That is not the standard for considering qualified immunity. The applicable standard is the one announced in the last paragraph of the majority opinion: whether it was objectively reasonable for Dr. Foote to believe that his conduct satisfied the constitutional standards of *Estelle v. Gamble*. *See Al-Jundi v. Mancusi*, 926 F.2d 235, 239 (2d Cir. 1991).

Under *Estelle* (and its progeny), Hathaway must show that Dr. Foote's conduct amounted to "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.* at 106.

Hathaway has offered no evidence whatever that Dr. Foote was deliberately indifferent to Hathaway's medical needs. Deliberate indifference is not an inadvertent failure to provide adequate medical care. *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986). Hathaway must demonstrate that Dr. Foote "actually wish[ed] him harm, or, at least, [was] totally unconcerned with his welfare." *Duane v. Lane*, 959 F.2d 673, 677 (7th Cir. 1992). Absent a showing of the "unnecessary and wanton infliction of pain," *Estelle*, 429 U.S. at 103 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)), the "proper forum" for a prisoner's medical grievance is a state court action for medical malpractice. *Estelle*, 429 U.S. at 107.

It is undisputed that Hathaway's hip re-fusion surgery was elective, and that the need for the operation was a function of the pain that Hathaway was experiencing. It is

also undisputed that the surgery was offered on December 2, 1977. Hathaway, who best knew the level of his discomfort and his ability to contend with it, declined that option on February 3, 1978. When he asked Dr. Foote for surgery in 1981, Dr. Foote promptly referred Hathaway to a specialist. Hathaway asked for hip surgery again on August 5, 1983, but he recanted a few hours later and demanded a second opinion. These events refute altogether the idea that Hathaway was begging an indifferent and calloused doctor for a surgical procedure required to alleviate his agony. Pain is subjective. Given the level of pain that the patient is suffering, the patient's own pain threshold, the risks and possible benefits of an operation, and the pain of surgery, there is nothing odd about someone waiting years before undergoing elective orthopedic surgery.

II

The majority faults Dr. Foote in a number of respects, none of which remotely evinces deliberate indifference. According to the majority, the most telling circumstance is the one year delay between the time that Dr. Foote learned of the broken pins and the time Hathaway learned of them. This delay, however, is meaningless absent a showing that it was the product of deliberate indifference. *See Wilson v. Seiter*, 111 S. Ct. 2321, 2324 (1991) (prison official must possess sufficiently culpable state of mind); *Duane*, 959 F.2d at 677 (no cognizable Eighth Amendment claim where prisoner "makes no allegations whatsoever that speak to the [prison officials'] mental states with regard to his medical care"). Hathaway himself admits that Dr. Foote treated him "for his hip pain almost 20 times" during this one year span. *See Jackson v. Cain*,

864 F.2d 1235, 1244 (5th Cir. 1989) (prison doctor granted summary judgment where "[t]here [was] no evidence that [prisoner] was denied medication or access to medical attention").

A finding of deliberate indifference is absolutely precluded here, because Hathaway always knew all there was to know about his own pain, and *always* had the option to undergo surgery to alleviate it. The one-year failure to tell Hathaway about the broken pins at most deprived Hathaway of a fact that might have had bearing on his decision to have elective surgery during that year. On that subject, Dr Quellman testified that the breaking of the pins was a marginal consideration, while Hathaway testified that the state of the pins was critical to his election of surgery. In any event, such a controversy is not properly or sensibly presented under the Eighth Amendment. "We do not sit as a medical board of review. Where the dispute concerns not the absence of help, but the choice of a certain course of treatment, or evidences mere disagreement with considered medical judgment, we will not second guess the doctors." *Sires v. Berman*, 834 F.2d 9, 13 (1st Cir. 1987).

At trial, the undisputed medical testimony was that Hathaway's pain—not the presence of the broken pins—was the medical indication justifying surgery. This cannot be disputed because in fact the pins were never removed. Hathaway testified:

> Q: Now the exhibit shows an X-ray of your hip and it shows these pins?
>
> A: Yes.
>
> Q: Are any parts of these still in your body?
>
> A: Yes, they're still there.

Given this admission, the uncontradicted medical testimony at trial, and the fact that Hathaway has not attacked the adequacy of the surgical procedure that left the pins largely intact, Hathaway cannot withstand a dismissal on the ground of qualified immunity by the resolve expressed by his counsel at oral argument to supplement the plaintiff's case with medical testimony at a future second trial.

The majority also finds evidence of Dr. Foote's deliberate indifference in the fact that "Hathaway testified that shortly after learning of the broken pins, he told Foote that he would consent to hip surgery." Hathaway's testimony about that July, 1981 consultation also establishes that, as soon as Hathaway mentioned surgery to Dr. Foote, the general practitioner referred Hathaway to Dr. Quellman, an orthopedic specialist. I agree with the majority that we need not adopt a rule exempting "general practitioners from being found deliberately indifferent to a patient's serious medical needs as long as that general practitioner *at some point* refers the patient to a specialist, regardless of the extent of contact that general practitioner has with the patient." (Emphasis added.) Surely it matters, however, in an examination of Dr. Foote's mental state, that he referred Hathaway to a specialist *promptly*, and took steps within his own medical expertise to alleviate Hathaway's pain.

Finally, the majority grounds its finding of deliberate indifference in Dr. Foote's failure to act on two letters written by "student attorneys" requesting further evaluation and informing the prison superintendent that Hathaway would consent to surgery. Foote, however, could not properly act on a consent to surgery given by someone other than his patient. Moreover, I do not see how see how a general practice physician can be found to have acted with deliberate indifference in promptly referring a

patient to a specialist rather than unilaterally ordering surgery. Dr. Foote, being neither an orthopedist nor a law student, acknowledged his limited expertise in the treatment of this patient.

III

The facts in *Estelle* furnish a template for evaluating medical malfeasance claims under the Eighth Amendment and the invocation of qualified immunity for such claims. The examples of deliberate indifference cited in *Estelle* furnish no analog to Dr. Foote's professional conduct. In *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974), the prison surgeon discarded the prisoner's ear and stitched the stump, explaining to the prisoner that he "did not need his ear" and throwing "the severed portion away in front of him." 508 F.2d at 544. In *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974), the prison doctor injected the prisoner with penicillin, knowing that the prisoner was allergic, and then refused to treat the allergic reaction. In *Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1970), the prison doctor refused to administer the prescribed pain killer and frustrated the prisoner's leg surgery by requiring the prisoner to stand despite contrary instructions of the surgeon.

What did Dr. Foote do? He arranged consultations with a medical specialist who offered surgery to correct the condition; when the patient declined surgery, Dr. Foote issued pain-killers, prescribed and arranged the replacement of corrective footwear, arranged housing on the first floor of the prison to reduce stair-climbing, and excused the prisoner from work detail. Altogether, Dr. Foote saw his patient dozens of times. These facts most closely resemble the facts in the *Estelle* opinion, which of course

rejected the claim of deliberate indifference. In *Estelle*, the inmate contended "that more should have been done by way of diagnosis and treatment, and suggest[ed] a number of options that were not pursued." 429 U.S. at 107. Nevertheless, because the prisoner was "seen by medical personnel on 17 occasions spanning a 3-month period," *id.*, the Supreme Court found that the prisoner did not make out a cognizable Eighth Amendment claim. And that case involved the dismissal of a *pro se* complaint for failure to state a claim under a standard far more liberal than the one a counseled plaintiff must satisfy to overcome a defense of qualified immunity. The record of Dr. Foote's services to Hathaway reflects far greater solicitude, attention and care.

The cases following *Estelle* reinforce the view that Dr. Foote's care of his patient implicates no Eighth Amendment concern. *See, e.g., Jones v. Smith*, 784 F.2d 149 (2d Cir. 1986) (no violation where prisoner, who had refused treatment before being moved to special housing unit, was denied prescribed therapy for a back injury after the move); *Sosebee v. Murphy*, 797 F.2d 179 (4th Cir. 1986) (no violation where doctor prescribed stomach nostrums to an inmate who, having swallowed a steak bone, later died of a punctured esophagus); *Lynsky v. City of Boston*, 761 F. Supp. 858 (D. Mass. 1990) (no violation where doctor failed to order diagnostic tests for obese inmate with a heart condition who died soon after of a heart attack).

I cannot agree that Dr. Foote's treatment of his patient was "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Estelle* at 105. The record below—undisputed after trial—does more than redeem Dr. Foote from the taint of depravity or sadism that a viable Eighth

Amendment claim entails. This record in my view indicates that Dr. Foote and the people of the State of New York can take pride in the solicitous and humane care that Dr. Foote afforded his incarcerated patient.

APPENDIX B—Memorandum Opinion and Order of the United States District Court for the Northern District of New York Dated October 27, 1993

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

WILLIAM HATHAWAY,

Plaintiff,

v.

DR. JOSEPH FOOTE, BENJAMIN DYETTE and JAMES SULLIVAN,

Defendants.

82-CV-1168
(FJS)

Appearances:

For the plaintiff: Law Offices of Edward Z. Menkin, State Tower Building, 109 South Warren Street, Suite 909, Syracuse, NY 13202. Of Counsel: Edward Z. Menkin, Esq.

For the defendant: Hon. Robert Abrams, Attorney General of the State of New York, Attorney for Defendants, Department of Law, The Capitol, Albany, New York 12224. Terrence X. Tracy, Esq., Asst. Attorney General

MEMORANDUM DECISION AND ORDER

I. Background

This matter was tried to a jury from October 13, 1993 through October 15, 1993. After their deliberations, the jury informed the Court on October 18, 1993 that they were deadlocked and unable to reach a verdict in this action. This court therefore declared a mistrial on October 18, 1993, and dismissed the jury.

After the close of plaintiff's proof in this case, and again after the close of their proof, the defendants moved, pursuant to Rules 50(a) and (b) of the Federal Rules of Civil Procedure respectively, for judgment as a matter of law against the plaintiff. This court reserved decision on these motions at the time. For the following reasons, this court denied defendants' motions.

II. Discussion

In *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041 (2d Cir. 1992), the Second Circuit recently discussed the standard that courts must apply in ruling on motions under Rule 50 of the Federal Rules of Civil Procedure. The court noted that such a motion may only be granted where there is "such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded men could not arrive at a verdict against him." *Id.* at 1046.

In the present case, this court cannot find that the evidence presented at trial was so overwhelming in favor of the defendants that reasonable and fair-minded individuals could not arrive at a verdict against the defendants herein. Thus, this court must deny defendants' motions under Rules 50(a) and (b) of the Federal Rules of Civil Procedure for judgment as a matter of law against the plaintiff.

Counsel are advised that this matter will be re-tried to a jury commencing at 10:00 a.m. on November 15, 1993, at the United States District Courthouse in Syracuse, New York.

IT IS SO ORDERED.

DATED: October 27, 1993
Syracuse, New York

s/Frederick J. Scullin, Jr.
U.S. District Judge

Filed
Oct. 27,1993
U.S. District Court
N.D. of N.Y.
George A. Ray, Clerk
Syracuse

APPENDIX C—Opinion of the United States Court of Appeals for the Second Circuit Rendered on March 9, 1988

William HATHAWAY,
Plaintiff-Appellant,

v.

Thomas A. COUGHLIN, Commissioner, E.W. Jones, Superintendent of the Great Meadow Correctional Facility, and Dr. Foote at Comstock, New York, Defendants-Appellees.

No. 72, Docket 86-2331.

United States Court of Appeals,
Second Circuit.

Submitted Nov. 17, 1987.

Decided March 9, 1988.

Inmate brought civil rights action against prison officials, alleging he was unconstitutionally denied necessary medical care. The United States District Court for the Northern District of New York, Neal P. McCurn, J., granted officials' motion for summary judgment, and inmate appealed. The Court of Appeals, Lumbard, Circuit Judge, held that genuine issue of material

fact existed as to whether officials demonstrated deliberate indifference to inmate's serious medical needs by delay in arranging surgery to correct broken pins in hip.

Reversed and remanded.

1. Prisons ⇐17(2)

It is enough for prisoner to show deliberate indifference to serious medical needs to establish unconstitutional denial of medical care. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 8.

2. Federal Civil Procedure ⇐2491.5

Genuine issue of material fact existed as to whether prison officials showed deliberate indifference to inmate's serious medical needs by delay in arranging surgery to correct broken pins in inmate's hip, precluding summary judgment on inmate's federal civil rights claim. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 8.

William Hathaway, pro se.

Robert Abrams, Atty. Gen. of the State of New York, Albany, N.Y. (Peter H. Schiff, Deputy Sol. Gen., William J. Kogan, Asst. Sol. Gen., Lew A. Millenbach, Asst. Atty. Gen., of counsel), for defendants-appellees.

Before LUMBARD, KEARSE and ALTIMARI, Circuit Judges.

LUMBARD, Circuit Judge:

William Hathaway, *pro se*, appeals from an order of the United States District Court for the Northern District of New York, Neal P. McCurn, *Judge*, that granted appellees' motion for summary judgment and dismissed Hathaway's complaint. His complaint alleged, under 42 U.S.C. § 1983, that the appellees unconstitutionally denied him necessary medical care while he was an inmate in a New York State correctional facility by denying him treatment for a hip condition for over a year beginning on July 10, 1981. Finding that the record discloses unresolved issues of fact, concerning whether he was intentionally denied necessary medical care, we reverse and remand for further proceedings.

I.

Hathaway is currently an inmate at Sing Sing Correctional Facility in Ossining, New York. From the record, it appears that he was an inmate at the Great Meadow Correctional Facility in Comstock, New York, at all times relevant to this action. His complaint, brought under 42 U.S.C. § 1983, alleges that the appellees unconstitutionally deprived him of necessary medical care

by denying him treatment for a hip condition for over a year beginning on July 10, 1981.

Hathaway alleges that he first began to complain of hip pain in June, 1981. He went to the prison clinic at the Great Meadow Facility and was treated by Dr. Foote who prescribed pain medication for his condition. Apparently still suffering with hip pain, Hathaway was taken to a local hospital in July 1981; x-rays taken at the hospital showed that two metal bone pins, which had been inserted in his hip in an earlier surgical procedure, had broken. Hathaway contends that his pain continued through August 1982. His specific allegation of denial of medical treatment is that on August 19, 1982 he requested of Gerald Wojewodzic, a corrections officer at Great Meadow, that he be taken to the hospital clinic because of his hip pain. Wojewodzic was informed by prison officials that only emergencies would be handled by the clinic that day and that there would be no general sick call until the next day. As a result of this incident, Hathaway filed a grievance with E.W. Jones, superintendent of the Great Meadow Facility. Ultimately, Hathaway was re-evaluated for surgery in January and February, 1983; he underwent corrective surgery on October 13, 1983.

In his complaint, Hathaway named as defendants Thomas A. Coughlin, Commissioner of the Department of Correctional Services, E.W. Jones, and Dr. Foote, all of whom are appellees in this case. The defendants moved for summary judgment pursuant to Fed.R.Civ.P. 56 on the basis that Hathaway's complaint alleged no genuine issues of fact because he had received and continues to receive adequate medical care and because, even if he had been deprived of care, neither Coughlin nor Jones was personally involved in the denial.

The case was referred to Magistrate Edward M. Conan by Judge Edmund Port of the Northern District of New York. In his report Magistrate Conan recommended the denial of appellees' motion for summary judgment with respect to Hathaway's claim that he had been denied medical treatment because Hathaway made a claim of intentional efforts by state officials to delay medical care, and, on a motion for summary judgment, the "court is not in a position to resolve factual questions as to the quality of medical care provided to the plaintiff." Second, he recommended granting summary judgment as to Coughlin because he found that Hathaway had made no allegation that Coughlin had any personal involvement in any denial of medical care to

Hathaway. Third, he recommended that appellees' motion for summary judgment regarding the claim that Jones had no personal involvement be denied because he

found sufficient allegations of personal involvement on the part of Jones.

In reviewing Magistrate Conan's findings, Judge McCurn disagreed with the Magistrate's interpretation of Hathaway's complaint. Judge McCurn apparently believed that the Magistrate viewed Hathaway's claim as an allegation that his hip operation was delayed for two years. Judge McCurn interpreted Hathaway's claim as an allegation that he had been denied medical attention since July 10, 1981. After reviewing documents submitted by the appellees in support of their motion, Judge McCurn concluded that Hathaway's medical record did not support "a potential finding of 'deliberate indifference to serious medical needs' within the purview of *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) even after construing the facts in a light most favorable to [Hathaway]." As a consequence, he granted the appellees' motion for summary judgment. Because the court

granted this motion on the basis that Hathaway failed to make out a claim of deliberate indifference to his medical needs, Judge McCurn did not reach the issue of the personal involvement of any of the defendants in the denial of medical care to Hathaway.

II.

We disagree with the district court's decision to grant the appellees' motion for summary judgment.[1] On a motion for summary judgment, the district court must " 'resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, [citation omitted], with the burden on the moving party to demonstrate the absence of any material fact genuinely in dispute.' " *Schiess-Froriep Corp. v. S.S. Finnsailor*, 574 F.2d 123, 126 (2d Cir.1978) (*quoting Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir.1975)). Our review of the record

1. On appeal, Hathaway claims that he was denied procedural due process because he was denied the time allotted to reply to the district court's order under Fed.R.Civ.P. 12(a). We do not agree; Rule 12(a) is inapplicable because it only pertains to the time allowed a plaintiff to reply to a counterclaim.

demonstrates that the district court did not apply this standard correctly.

[1] To establish an unconstitutional denial of medical care, it is enough for the prisoner to show deliberate indifference to serious medical needs. *See Estelle v. Gamble*, 429 U.S. at 104–05, 97 S.Ct. at 291–92; *see also Archer v. Dutcher*, 733 F.2d 14, 16–17 (2d Cir.1984) (a prisoner must allege that he was intentionally denied needed medical care over a period of time by prison officials, while he was in extreme pain, or that medical care was completely withheld).

In *Archer v. Dutcher, supra*, faced with allegations similar to those at bar, we found that

> [i]t appears from the affidavits filed by appellees that [the appellant]'s case may well be without merit [because] ... appellant received extensive medical attention, and the records maintained by the prison officials and hospital do substantiate the conclusion that appellees provided [appellant] with comprehensive, if not doting, health care. Nonetheless, Archer's affidavit in opposition to the motion for summary judgment does raise material factual disputes, irrespective of their likely resolution.

Id. at 16. We found that accepting appellees' arguments and granting summary judgment to the appellees "would require us to make factual findings were we to accept them. This is not our role, nor was it appropriate for [the district court] to make such findings in granting a motion for summary judgment." *Id.* at 17.

[2] Applying *Archer's* reasoning to this case, we believe that Magistrate Conan applied the appropriate standard in his order and recommendation. Hathaway's affidavit in opposition to appellees' motion for summary judgment alleged that a delay of over two years in arranging surgery to correct the broken pins in his hip amounted to deliberate indifference to his serious medical needs. We believe this is a suffi-

51

cient allegation to survive a motion for summary judgment under *Archer* because it raises a factual dispute as to whether the appellees showed deliberate indifference to Hathaway's serious medical needs in the period after July 10, 1981. We therefore disagree with the district court's conclusion that summary judgment was appropriate.

Reversed and remanded for further proceedings consistent with this opinion.

APPENDIX D—Order of the United States District Court for the Northern District of New York Dated July 17, 1986

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

WILLIAM HATHAWAY,

Plaintiff,

v.

THOMAS A. COUGHLIN, Commissioner of the Department of Correctional Services; E.W. JONES, Superintendent of Great Meadow Correctional Facility, and DR. FOOTE,

Defendants.

82-CV-1168

Appearances: William Hathaway, Plaintiff, Pro Se, #76-A-2820, Box 51, Comstock, New York 12821-0051

Hon. Robert Abrams, Attorney General of the State of

New York, Attorney for Defendants, The Capitol, Albany, New York 12224. Of Counsel: Robert B. Keyes, Assistant Attorney General

Neal P. McCurn, D.J.

ORDER

The above matter comes to me following a Report-Recommendation by Magistrate Edward M. Conan, duly filed on the 25th day of February 1986. The above action was reassigned to me pursuant to Judge Port's request. Following service thereof, and on or about April 4, 1986, the Clerk has sent me the entire file, including any and all objections filed by the parties herein.

The defendants objections to the Magistrate's Report-Recommendation appear to be well taken. A review of the complaint herein does not support the Magistrate's supposition that "the essence of plaintiff's claim is that defendants delayed his hip operation for over two years." The gravemen of plaintiff's complaint is an alleged denial of specific medical treatment on August 19, 1982 and a general allegation of a denial of medical treatment since July 10, 1981. Nowhere in the complaint is it alleged that the basis of plaintiff's complaint is a delayed hip operation. Further, the plaintiff's medical care record, submitted in support of the defendants' motion, in no way supports a potential finding of "deliberate indifference to serious medical need" within the purview of *Estelle v. Gable*, 429 U.S. 97, 104 (1976) even after construing the facts in a light most favorable to the plaintiff.

Accordingly, after careful review of all of the papers herein, including the Magistrate's Report-Recommendation, and the defendants' objections submitted thereto, it is

ORDERED, that

1. The Magistrate's Report is accepted, but the court declines to adopt the Magistrate's Recommendations.

2. Summary judgment is granted to the defendants and the complaint herein is dismissed.

Dated: July 17, 1986
Utica, New York

s/Neal P. McCurn
U.S. District Judge

Filed
Jul. 23, 1986
U.S. District Court
N.D. of N.Y.
J.R. Scully, Clerk
Syracuse

APPENDIX E—Order of the United States District Court for the Northern District of New York Dated February 18, 1986 and Report and Recommendation of the U.S. Magistrate Judge in Hathaway v. Coughlin

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

WILLIAM HATHAWAY,

Plaintiff,

vs.

THOMAS A. COUGHLIN, Commissioner of the Department of Correctional Services; E.W. JONES, Superintendent of Great Meadow Correctional Facility, and DR. FOOTE,

Defendants.

82-CV-1168

Appearances: William Hathaway, Plaintiff, Pro Se, #76-A-2820, Box 51, Comstock, New York 12821-0051

Hon. Robert Abrams, Attorney General of the State of New York, Attorney for Defendants, The Capitol, Albany,

New York 12224. Of Counsel: Robert B. Keyes, Assistant Attorney General

Edward M. Conan, Magistrate

ORDER and REPORT-RECOMMENDATION

This matter was referred to the undersigned for report and recommendation by the Honorable Edmund Port by Standing Order dated November 6, 1979.

The complaint in this action alleges that the defendants unconstitutionally denied plaintiff medical care by delaying a necessary hip operation for approximately two years. Defendants contend that plaintiff has at all times received adequate medical care and attention. The case is presently before the court on defendants' motion for summary judgment.

Plaintiff alleges that defendants were deliberately indifferent to his serious medical needs by their failure to provide him with an operation for two years. Specifically, he alleges that he first started to complain of hip pain in June, 1981. He went to the clinic and there Dr. Foote gave him pain medication. In July, 1981, plaintiff was taken to a local hospital. X-rays showed that two metal bone screws had broken since an earlier hip operation. Plaintiff further alleges that his hip pain continued through August, 1982, and that he was denied access to the prison clinic on August 19, 1982. As a result of this incident, plaintiff filed a grievance which was accepted by defendant Jones. Plaintiff was re-evaluated for surgery in January and February, 1983. He eventually underwent surgery on October 13, 1983.

Summary judgment may be granted when the moving party carries its burden of showing the absence of a genuine

issue of material fact. Fed. R. Civ. P. 56; *Project Release v. Prevost*, 722 F.2d 960, 968 (2d Cir. 1983) (citations omitted). "Ambiguities or inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the summary judgment motion." *Id.*

The Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976) held that the Eighth Amendment is violated where an inmate is treated with a "deliberate indifference to serious medical needs". The defendants argue that plaintiff received more than adequate medical care. Defendants also contend that defendants Coughlin and Jones had no personal involvement in any of the facts relating to the complaint. The court will treat these arguments seriatim.

I. Medical Care:

The essence of plaintiff's claim is that defendants delayed his hip operation for over two years. As the Second Circuit has recently made clear, allegations of intentional efforts to delay medical care state a claim under *Estelle v. Gamble*. *Archer v. Dutcher*, 733 F.2d 14, 16 (2d Cir. 1984). Further, this court is not in a position to resolve factual questions as to the quality of medical care provided to the plaintiff. It may be that plaintiff did not, in fact, need an operation immediately after discovery of the broken screws. This is certainly not a question that can be resolved on a motion for summary judgment. *See Williams v. Dir. of Health Services, Etc.*, 542 F. Supp. 883, 885 (S.D.N.Y. 1982).

II. Personal Involvement:

It is well settled that the personal involvement of a defendant is a prerequisite for the assessment of damages in a section 1983 action, *McKinnon v. Patterson*, 568 F.2d 930,

940 (2d Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978), and that the doctrine of respondeat superior is inapplicable to section 1983 claims. *Polk County v. Dodson,* 454 U.S. 312, 325 (1981); *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973).

After a careful reading of the complaint, this court finds no allegation of personal involvement on the part of defendant Coughlin. In fact, defendant Coughlin is only mentioned in the caption of the complaint. The complaint does not even charge knowledge or tacit approval of the alleged constitutional deprivations. *See Taylor v. Mayone,* 626 F.2d 247, 250 n.2 (2d Cir. 1980); *Turpin v. Mailet,* 619 F.2d 196, 201 (2d Cir. 1980).

However, the court has found sufficient allegation of personal involvement on the part of defendant Jones. Attached to plaintiff's reply to defendants' answer are two letters written to Jones by Prisoners' Legal Services of New York. In the letter dated October 12, 1982, a legal assistant described plaintiff's medical problems and stated that plaintiff was willing to undergo surgery. Plaintiff has thus raised an issue of material fact regarding Jones' personal involvement in allegedly delaying needed medical care. *See Williams v. Smith,* No. 85-2158, slip op. at 1041-42 (2d Cir. Jan. 15, 1986).

WHEREFORE, on the basis of the findings in the above REPORT, it is

RECOMMENDED, that defendants' motion for summary judgment be granted as to defendant Coughlin, and it is further RECOMMENDED, that defendants' motion for summary judgment in all other respects be denied, and it is

ORDERED, that the parties proceed with discovery that had previously been held in abeyance pending the court's resolution of defendants' motion for summary judgment.

s/Edward M. Conan
United States Magistrate

Dated: February 18, 1986
Syracuse, New York

Filed
Feb. 25, 1986
U.S. District Court
N.D. of N.Y.
J.R. Scully, Clerk
Utica